ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CACR06-882

APRIL 11, 2007

SHANNON GAMEWELL APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR05-4622]
V.	HON. CHRIS PIAZZA, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Shannon Gamewell was convicted in a bench trial for possession of a firearm by a felon. He raises one point on appeal, challenging the sufficiency of the evidence. He notes that no firearm was introduced into evidence at trial, nor was there any expert testimony that a shotgun found in his home fit within the definition of a firearm. We agree with the State that his argument is unavailing; therefore, the conviction is affirmed.

Subject to limited exceptions not applicable in the present case, it is unlawful for a convicted felon to possess or own a firearm. Ark. Code Ann. § 5-73-103(a)(1) (Repl. 2005). A "firearm" is any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use. Ark. Code Ann. § 5-1-102(6)(A) (Repl. 2006). "Firearm" includes a device described in subdivision (6)(A) that is not loaded or lacks a clip or another component to render it immediately operable, as well as components

that can readily be assembled into a device described in the subdivision. Ark. Code Ann. § 5-73-102(6)(B)(i) and (ii).

The following facts were undisputed. On July 13, 2005, Maumelle police officers Chris Lester and Scott Bryant served an order of protection on Gamewell at his residence. After telling him that they had information that he was a felon who kept firearms and/or explosives, Lester asked for consent to search the house and vehicle. Gamewell denied the truth of this information. He refused to sign a written consent form, but he verbally consented to the search.

Officer Lester testified at trial that Gamewell walked the officers through the house and that in the master bedroom Gamewell stated, "There's a shotgun under the bed." Lester described the gun as "a Benelli twelve-gauge shotgun." Gamewell objected to this testimony, stating, "Unless the firearm is produced or there's an expert to testify that it is in fact a firearm, this officer cannot testify that it is in fact a firearm." The trial court denied the objection, ruling that Lester could describe what he saw in the bedroom.

Lester then testified that Gamewell opened up a gun case, revealing "a camouflage, broke down, twelve-gauge, Benelli shotgun. The barrel was taken apart, and it was put in the case as it is supposed to. I read the shotgun and it said twelve-gauge Benelli shotgun, serial number U270838." Gamewell objected on the basis of hearsay that Lester could not cross-examine "what was written on this object that he took out from under the bed." The objection was denied.

Finally, Lester testified that the officers ran a criminal check on Gamewell and learned that he had been arrested for a felony; the report did not, however, verify a conviction. After speaking with their supervisors, the officers left the gun at the residence and Lester made a report noting the firearm.

Under cross-examination Lester testified that he knew what a shotgun looked like, that he owned a shotgun, and that he believed that what he saw in the bedroom was a shotgun. He acknowledged that he did not assemble or fire the shotgun at issue, did not know if it would fire, and did not know if it was capable of being assembled. He reiterated that Gamewell told him "it was a shotgun."

Officer Bryant testified that Gamewell was very cooperative, talked the whole time as they entered the bedroom, and said that he had a shotgun underneath the bed. Bryant said that Gamewell retrieved the shotgun and placed it on the bed in an unopened case, which Lester opened. Bryant described the shotgun as a "Benelli pump shotgun, twelve-gauge." Bryant testified that the officers left the gun at the residence because there was no proof at the time of Gamewell's felony conviction but that, based on information subsequently discovered, an arrest warrant was issued later.

Bryant testified on cross-examination that he did not assemble the object that had been under the bed, nor did he fire it or know whether it was capable of firing. He stated, "In our line of work, we can pretty much tell what's a shotgun and what's not a shotgun. According to the serial numbers and the brand on it, it was a shotgun." He acknowledged that he did

not check with Benelli and that the shotgun was not submitted to the crime lab to determine whether it was in fact a firearm.

The State concluded its case after introducing documents that Gamewell had previously been convicted of first-degree battery. Gamewell moved to dismiss for insufficiency of the evidence, alleging a failure of proof that what was seen in the residence fell within the definition of "firearm." He argued that this case was unlike others where firearms were introduced into evidence or expert testimony was presented. The court denied the motion, citing circumstantial evidence that the object at issue was a weapon readily capable of firing.

The defense rested without presenting any evidence, and Gamewell renewed his motion to dismiss for lack of sufficient evidence.[1] He argued that the "writings" on the gun were hearsay, which he could not cross-examine, and that there had been no evidence from the Benelli shotgun makers. He noted that the gun had not been introduced into evidence, that the officers did not know if it was capable of firing a projectile, and that the court did not have the item before it "to make a determination." He argued that the only evidence before the court was circumstantial evidence, which could not amount to substantial evidence without excluding every reasonable hypothesis other than his guilt, and he complained that the court had not considered such possibilities as the gun being a BB gun or "lots of things." The court denied this motion.

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[1]When the case proceeded to the sentencing phase, Gamewell took the stand to proffer testimony about his belief that his previous felony conviction had been expunged. However, on appeal he does not argue that the evidence was not sufficient to prove that he was a convicted felon.

Sufficiency of the Evidence

When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State, and only the evidence supporting the verdict will be considered. *Loar v. State*, ___ Ark. ___, ___ S.W.3d ___ (Nov. 30, 2006). The appellate court will affirm a judgment of conviction if there is substantial evidence to support it. *Id.* Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Circumstantial evidence may constitute substantial evidence to support a conviction: the longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every reasonable hypothesis other than that of the guilt of the accused. *Id.* The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the fact finder to decide. *Id.* Direct evidence is evidence that proves a fact without resort to inference when, for example, it is proved by witnesses who testify as to what they saw, heard, or experienced. *Lowe v. State*, 357 Ark. 501, 182 S.W.2d 132 (2004). It is the duty of the trier of fact, rather than of the appellate court, to weigh the evidence and to determine the credibility of witnesses. *Id.*

Gamewell asserts that the officers' testimony did not constitute circumstantial evidence sufficient to prove possession of a "firearm" as defined by Arkansas Code Annotated section 5-1-102(6). He complains that the firearm was not introduced into evidence, that testimony that it was a firearm was based on hearsay evidence of the serial number, and that officers

testified only about an unassembled shotgun that they did not test fire or assemble in order to determine if it operated.

In *Ward v. State*, 64 Ark. App. 120, 981 S.W.3d 96 (1998), the appellant argued that rifles modified to fire only blanks were not "firearms"; we rejected his argument, noting testimony that the weapons could be made capable of firing live ammunition again by simply unscrewing the blank adapter and screwing on a gas cylinder lock. Our supreme court has rejected an argument that a pistol was not capable of firing specified ammunition when the hammer was not attached and the firing pin was missing. *S.T. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994) (interpreting the statutory phrase "capable of ammunition or centerfire ammunition" and upholding a conviction for possession of a handgun by minors). Our supreme court has also ruled that a muddy and rusty rifle in a degraded condition, even if not immediately operable, can be considered a firearm within the statutory definition:

> [I]t is immaterial whether the firearm-device is loaded or lacks a component, such as a clip or magazine, that could make it capable of expelling a projectile. Thus, once a device is made for the purpose of expelling a projectile by the action of an explosive, it meets the statutory definition of a firearm. . . . Had the legislature intended Hunt's temporal meaning of a firearm, it could have simply defined a firearm as a device only capable of expelling a projectile. Since the firearm in question was designed to be used in a manner consistent with Ark. Code Ann. § 5-1-102(6), the rifle is a firearm within the ordinary meaning of the word used by the legislature. *S.T. and C.B. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994).

Hunt v. State, 354 Ark. 682, 687,128 S.W.3d 820, 824 (2003). *See also Curtis v. State*, 76 Ark. App. 458, 68 S.W.3d 305 (2002) (holding that, where the appellant kept a handgun in his store and the gun was loaded, circumstantial evidence constituted sufficient evidence to

support a finding that the handgun was "designed, made, or adapted to expel a projectile" within the meaning of section 5-1-102(6)).

Two police officers testified in the present case, based upon their personal and professional experience, that the disassembled firearm was a twelve-gauge Benelli shotgun. As the foregoing cases show, whether or not the shotgun was fully assembled and immediately operable is not relevant to a determination of whether it met the statutory definition of "firearm." It was not necessary for the firearm to have been admitted at trial. *See Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986) (holding that, in a criminal case, a witness may testify concerning tangible objects that are involved without producing the articles); *see, e.g., Loar v. State*, ___ Ark. ___, ___ S.W.3d ___ (Nov. 30, 2006) (holding that a pawn ticket for a gun, which the appellant signed, constituted circumstantial evidence that he constructively possessed the gun).

As for Officer Lester's testimony regarding the serial number on the shotgun, we agree with the State that Gamewell's hearsay argument must fail. The hearsay rule is not violated when a witness testifies about a physical object not presented in court, and an accused has no constitutional right to confrontation in the case of physical objects as opposed to witnesses who testify against him. *Johnson*, *supra*. Furthermore, the testimony at issue was not hearsay because it regarded the officer's belief that the gun was a shotgun rather than the accuracy of the serial number on the shotgun. *See* Ark. R. Evid. 801(c) (defining "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted).

We will not address a final argument in Gamewell's brief that his inculpatory statement "there's a shotgun under my bed" amounted to an extrajudicial confession that must be accompanied by other proof that the offense was committed. This argument was not raised at trial, and we therefore will not address it on appeal. *Loar*, *supra*.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.